# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1931

## No. 32

WILLIAM H. MECON, ADMINISTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, PETITIONER,

*vs.*

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 12, 1931

CERTIORARI GRANTED APRIL 20, 1931

(35,712)

# (35,712)

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1931

# No. 32

WILLIAM H. MECON, ADMINSTRATOR OF THE ESTATE OF ARCHIE LEE SMITH, DECEASED, PETITIONER,

*vs.*

FITZSIMMONS DRILLING COMPANY, INC., AND ATLANTIC OIL PRODUCING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX


| | Original | Print |
|---|---|---|
| Proceedings in United States circuit court of appeals, tenth circuit | a | 1 |
| Caption (omitted in printing) | a | |
| Record from district court of the United States, Western Oklahoma | a | 1 |
| Note re citation and service | 1 | 1 |
| Notice of appeal | 1 | 1 |
| Record from district court of Oklahoma County | 1 | 1 |
| Amended petition | 2 | 2 |
| Notice of petition and bond for order of removal | 8 | 8 |
| Petition for removal | 9 | 9 |
| Bond for removal | 24 | 23 |
| Order of removal | 24 | 23 |
| Clerk's certificate (omitted in printing) | 25 | |
| Motion to remand | 25 | 24 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 25, 1931

| | Original | Print |
|---|---|---|
| Response to motion to remand | 27 | 26 |
| Affidavit of George F. Short | 29 | 27 |
| T. Austin Gavin | 30 | 28 |
| H. C. Thurman | 31 | 29 |
| Transcript of proceedings before Hon. Wyley Jones, judge | 32 | 30 |
| Order overruling motion to remand | 33 | 32 |
| Separate answer of Fitzsimmons Drilling Company | 34 | 33 |
| Separate answer of Atlantic Oil Producing Company | 37 | 36 |
| Reply to separate answers of defendants | 40 | 39 |
| Journal entry of judgment | 40 | 39 |
| Order extending time to file bill of exceptions | 41 | 40 |
| Bill of exceptions | 42 | 41 |
| Record of evidence and proceedings on hearing of plaintiff's motion to remand | 42 | 41 |
| Record of evidence and proceedings on the trial | 46 | 44 |
| Stipulation approving bill of exceptions | 47 | 46 |
| Approval of bill of exceptions by district judge | 48 | 47 |
| Petition for appeal | 48 | 47 |
| Assignment of errors | 49 | 48 |
| Order allowing appeal | 50 | 49 |
| Bond on appeal | 50 | 49 |
| Precipe for record | 50 | 50 |
| Clerk's certificate (omitted in printing) | 52 | |
| Appearances of counsel ( " " " ) | 53 | |
| Argument and submission ( " " " ) | 54 | |
| Opinion, Pollock, J | 54 | 51 |
| Dissenting opinion, Cotteral, J | 59 | 57 |
| Judgment | 62 | 60 |
| Petition for rehearing (omitted in printing) | 63 | |
| Order denying rehearing | 99 | 60 |
| Motion to stay mandate | 99 | 61 |
| Order granting stay of mandate | 101 | 62 |
| Clerk's certificate (omitted in printing) | 101 | |
| Order allowing certiorari | 103 | 62 |

[fol. a] [Caption omitted]

[fol. 1]

## IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA

NOTE RE CITATION AND SERVICE

(Citation in proper form, directed to appellees, was issued Feb. 25, 1930, and on the same day service of said citation was accepted by counsel for said appellees.)

---

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Feb. 19, 1930

To the defendant, Fitzsimmons Drilling Company, and Hal C. Thurman, Ray Fellows, and Moss & Young, Its attorneys of record; and, Atlantic Oil Producing Company, a Corporation, and George H. Short, and Hagan & Gavin, Its attorneys of record.

Take Notice, that the plaintiff in the above entitled action appeals from the decision rendered in the above case on December 18, 1929.

Ford & Montgomery, Attorneys for Plaintiff, William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

Service of the above Notice acknowledged this 19th day of February, A. D. 1930.

H. C. Thurman, Attorney for Defendant Fitzsimmons Drilling Company. George F. Short, C. W. King, Attorneys for Defendant Atlantic Oil Producing Company.

[File endorsement omitted.]

---

IN DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, Plaintiff, vs. Fitzsimmons Drilling

Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, Defendants. No. 57713. "Lien claimed."

---

[fol. 2] AMENDED PETITION—Filed May 15, 1929

Plaintiff, after first having obtained leave of court so to do, files this as his amended petition herein.

First Cause of Action

Plaintiff, for his first cause of action against the defendants above named, and each of them, alleges and avers:

That he is the duly appointed, qualified and acting administrator of the estate of Archie Lee Smith, deceased, which deceased died intestate in the state of Oklahoma, on the 25th day of May, A. D. 1927, at or about the hour of seven o'clock, A. M. of said day, from and on account of injuries negligently inflicted upon him by the defendants, as hereinafter set out, at or about ten o'clock, P. M. on the 24th day of May, A. D. 1927, and that this suit is brought for damages for the wrongful death of said deceased, and is brought for the use and benefit of the next of kin of said deceased, and that all of the next of kin of said deceased are as follows, to-wit:

Lillian Smith, widow, age 32.

Donna G. Smith, daughter, age 6.

Welford Lee Smith, son, age 2 years.

That the plaintiff herein at the time of the filing of this petition is a resident and citizen in good faith of the state of Louisiana, having been a resident and citizen of said state for a period of more than twenty years prior to the filing of this suit.

That the corporate defendants above named, to-wit: Fitzsimmons Drilling Company and the Atlantic Oil Producing Company, and each of them, are corporations duly organized, created and existing according to law, and that the said defendants, and each of them, have an agent in Oklahoma county, state of Oklahoma, upon whom service of process can be had; that the defendant, Fitzsimmons Drilling Company, a corporation, is a resident and citizen of the state of Louisiana, and that the Atlantic Oil Producing Company is a resident and citizen of the state of Delaware

That on account of the above and foregoing facts this court has jurisdiction of the subject matter of this suit and the parties, and that said cause is not a removable cause to the Federal Court for the Western District of Oklahoma, [fol. 3] for the reason that both the plaintiff and the defendant, Fitzsimmons Drilling Company, are residents and citizens of Louisiana.

Plaintiff, for his first cause of action against the deherein at all times hereinafter mentioned were engaged in drilling a well prospecting for oil and gas in the greater Seminole Oil Field in the State of Oklahoma, the exact location of said well being to the plaintiff unknown, and plaintiff states that the said corporate defendants were drilling said well under and by virtue of a certain contract and private arrangement or agreement between them, the exact nature, terms and conditions of which are unknown to the plaintiff, but he alleges that he verily believes that the said defendant, drilling company, was an independent contractor on said well until the same had been drilled to a sufficient depth to penetrate a producing oil or gas sand, and that when said well had been drilled to a sufficient depth to penetrate an oil or gas sand, that the defendant, producing company, had authority to give orders and directions concerning the future drilling operations around said well, and that when said well had penetrated an oil and gas producing sand, then the relation between the said defendants would become that of principal and agent, instead of owner and independent contractor.

Plaintiff states that he verily believes that at the time the deceased was injured and killed, said well had been drilled to a sufficient depth to penetrate an oil and gas producing sand, and that the defendant, producing company, had interfered with the work, and had given certain orders relative to the drilling operations around said well, and that on account thereof at the time the said deceased was injured and killed, the defendant, drilling company, was the mere agent of its co-defendant, producing company, in the drilling operations around said well.

Plaintiff herein further states that within less than two hours prior to the time the deceased was injured and killed, the said drilling company by and through John C. Diver and other of its servants and agents, whose names are to the plaintiff unknown, and that one, L. H. Sharp, an em-

ployé and an agent and servant of the defendant drilling company, and other of its agents and servants whose names are to the plaintiff unknown, had been to the said drilling oil well where the deceased was employed as hereinafter [fol. 4] set out, and that the individuals above referred to were foremen and vice-principals of their respective masters, and had authority to and did direct the said deceased and the other employees who were working in, on and around the said well which was being drilled prospecting for oil and gas, as aforesaid, and that the said deceased and other employees who were working on, at and near said well were obliged to, and did conform to and obey the orders, directions and commands of the said individuals who were agents of their respective employers, defendants herein, and did actually obey the commands and orders which were given by the said Diver, Sharp, and others, and drilled the said well deeper, in pursuance of the orders and commands which had been given them by the said Diver, Sharp, and other individuals, whose names are to the plaintiff unknown.

Plaintiff further avers that the said well hereinbefore referred to, which was being drilled by the corporate defendants herein on the 24th day of May, A. D. 1927, had been drilled to a sufficient depth to penetrate a producing oil and gas sand, and that at the time the deceased was injured, and killed, as hereinafter set out, and for about a month prior thereto, the said well had been producing both oil and gas in large quantities and amounts, the said well producing natural gas in a volume and quantity in excess of three million cubic feet per day, and that the said well was spraying, flowing and producing oil at the rate of approximately two hundred barrels per day. That the said well had originally been connected up with the flow tank, but that for more than three days prior to the time the said deceased was injured and killed the said well had bee- disconnected and was not shut in, all of which was in violation of the conservation and waste laws of the State of Oklahoma.

That the said well at the time the deceased was injured had a control-head thereon, and had a short piece of pipe connected to the said control-head, which had been installed by both of the defendants herein working in conjunction with each other, and which condition had a tendency to and did cause the said oil and gas as it came out of the said well

to become confined underneath the floor of said derrick and in the cellar of said well, and without re-connecting up the said well with the flow tank that had been installed near said well, the said defendants herein, and each of them, act-
[fol. 5] ing through their respective duly authorized agents and servants to-wit: the said Diver and Sharp, and others whose names are to the plaintiff unknown, directed and instructed the said deceased and its other employees to continue working in, on and around said well, and directed and permitted the said deceased and its other employees to drill the said well deeper and to clean the same out, without it being entirely connected with the flow tank, and while the said well was making both oil and gas, as aforesaid.

That the said defendants herein on account of the above and foregoing method of doing and performing the work, to-wit, they ordered, directed and permitted the said deceased and their other employees herein to work on the said well without the same being completely and entirely connected up to and with the flow tank, when there was a safe, suitable and proper method of doing and performing the work, that of connecting the said well up to the said flow tank before ordering, directing and permitting the said deceased and its other employees to work in, on and around said well.

Plaintiff herein further states that the defendants herein, and each of them, adopted and promulgated rules and regulations for the doing and performing of said work, but that the said rules and regulations so promulgated were adopted and promulgated in a dangerous and careless manner and that the said defendants when they promulgated the said rules were negligent, for in that they should have promulgated rules and regulations requiring that no person should be directed, ordered or permitted to work in, on or about said well until the same had been entirely connected up with the flow tank.

Plaintiff further states that the said deceased on the day he was injured and killed was in the employ of the defendant drilling company as a driller on the well above referred to, but that the said deceased was subject to the orders, directions and commands of the defendant producing company as well as the drilling company, and was required to obey the orders of both defendants, and that the said deceased was on duty at the time he was injured and was

working in pursuance of orders, directions and commands which had been given to him by the said defendants, and each of them, prior to the time he was injured and killed.

Plaintiff further states that on account of the defendant's [fol. 6] failure herein only to partially connect up the said well with the flow tank and in not connecting the same up after it had been disconnected, the said oil and gas escaped from the said well and settled underneath the derrick floor and to the ground in and around the said drilling well and collected thereat in large volumes, quantities and amounts, and that about ten o'clock P. M. of said day the said oil and gas became ignited from some source or cause unknown to this plaintiff, and as a result thereof an explosion occurred, which was followed by fire, and that deceased's body was enveloped in flames, his clothing was set on fire and he was immediately severely burned and injured.

Plaintiff further states that the said deceased was severely burned on the outside of his body, and that he sucked and inhaled the flames into his throat and lungs, and he thereby became painfully, permanently and seriously injured, both internally and externally, a compete description of which is to the plaintiff unknown, but which injuries about eight or ten hours thereafter caused the said deceased to depart this life.

Plaintiff further states that the injuries and death of the said deceased were not caused or occasioned by any fault or neglect on his part, but were caused wholly, directly and proximately by and on account of the negligent acts of misfeasance and nonfeasance on the part of the said defendants, and each of them, as hereinbefore set out, and that the said negligence on the part of the said defendants, and each of them, concurred and commingled together and with each other and proximately caused deceased's injuries and death, and plaintiff further states that the acts and conduct of the defendants hereinbefore referred to also violated what is known as the Factory Act and Labor Laws of the State of Oklahoma.

Plaintiff further states that the said deceased at the time of his death was a strong, robust, healthy, able-bodied man, between thirty and thirty-five years of age, and had a life expectancy of more than thirty years. That he was employed and earning, and capable of earning from $300 to $[illegible] per month. That he was sober industrious, affection-

ate and dutiful, and had in the past contributed large sums of money to the support, health and comfort of his widow and children and had he lived would have continued to do [fol. 7] so for the remainder of his life, and that on account of his wrongful death his next of kin have sustained actual damages in the sum of One Hundred Thousand Dollars ($100,000.00), no part of which has ever been paid.

Wherefore, plaintiff prays that he have and recover a judgment against the said defendants, and each of them, for the use and benefit of the next of kin of said deceased, Archie Lee Smith, for the sum of One Hundred Thousand Dollars ($100,000.00) on his first cause of action herein.

Second Cause of Action

Plaintiff herein for a further and second cause of action against the said defendants, and each of them, alleges and avers:

That he herein adopts all of the allegations of his said first cause of action against the defendants which are set out herein, and makes said allegations a part of his second cause of action the same as if all of said allegations were herein again set out and re-alleged, and in addition thereto, plaintiff avers that the said deceased, Archie Lee Smith, who was injured about [redacted] o'clock P. M. on the 24th day of May, 1927, remained alive until about seven o'clock A. M. on the 25th day of May, 1927, and plaintiff further states that the said deceased was severally burned on the outside of his body, and that he sucked and inhaled the flames into his throat and lungs and he thereby became painfully, permanently and seriously injured, both internally and externally, a complete description of which is to the plaintiff unknown, but that the said deceased was conscious from the time he was injured until he died, and on account of his injuries suffered excruciating bodily pain and mental anguish from the time he was injured until he died, and on account thereof the deceased sustained actual damages in the sum of Three Thousand Dollars ($3,000.00), no part of which was paid to the deceased during his lifetime nor has any portion thereof ever been paid to this plaintiff.

Wherefore, Plaintiff prays that he have and recover a judgment against the said defendants, and each of them, on

his second cause of action herein for the sum of $3,000.00 for the use and benefit of the estate of the said deceased.

Wherefore, Plaintiff prays that he have and recover a judgment against the said defendants, and each of them, [fol. 8] on his first and second causes of action herein in the sum of $103,000.00; that he have and recover the costs of this action and all other relief.

A. H. Meyer and Ford & Montgomery, Attorneys for Plaintiff.

[File endorsement omitted.]

---

IN DISTRICT COURT OF OKLAHOMA COUNTY

NOTICE OF PETITION AND BOND FOR ORDER OF REMOVAL—Filed June 4, 1929

To William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, and Roy F. Ford and A. H. Meyer, his attorneys — record:

Please take notice that the defendants, Fitzsimmons Drilling Company, Incorporated, and Atlantic Oil Producing Company will, on the 4th day of June, 1929, at 1:30 o'clock P. M. file in the District Court in and for Oklahoma County, State of Oklahoma, their petition and bond for removal, copies of which are herewith served on you, and will as soon thereafter as counsel can be heard, present to said Court, and a Judge thereof, said petition and bond and request an order removing said cause to the District Court of the United States for the Western District of Oklahoma, in accordance with the prayer of said petition.

Dated this 3rd day of June, 1929.

H. C. Thurman, George F. Short, Attorneys for Defendants, Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company.

Service of copy of the above notice, with copies of petition and bond for removal is hereby acknowledged this 3rd day of June, 1929, at 11:50 o'clock A. M.

Ford & Montgomery and A. H. Meyer, Attorneys of Record for William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

[fol. 9] [File endorsement omitted.]

## In District Court of Oklahoma County

**Petition of Defendants, Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company, for Removal of Cause to the District Court of the United States for the Western District of Oklahoma—Filed June 4, 1929**

To the Honorable District Court within and for Oklahoma County, State of Oklahoma:

Come now your petitioners, Fitzsimmons Drilling Company, incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, defendants herein, and for the purpose set out in this petition only, and reserving to themselves, and each of them, any and all objections to the filing of plaintiff's amended petition herein, and all objections to the sufficiency thereof, respectfully represent to this Honorable Court.

I

That on or about the 14th day of May, 1929, the above named plaintiff filed in the District Court within and for Oklahoma County, State of Oklahoma, his amended petition naming Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, as defendants therein, and praying for judgment on his first cause of action for the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of Lillian Smith, also known and referred to as Mrs. A. L. Smith, the widow of A. L. Smith, deceased, and Donna G. Smith and Welford Lee Smith, children of A. L. Smith, deceased, they being the next of kin of said A. L. Smith, deceased, as damages sustained by said next of kin by reason of the alleged wrongful death of A. L. Smith, deceased, and praying in plaintiff's second cause of action judgment against said defendants for Three Thousand ($3,000.00) Dollars for the use and benefit of the estate of A. L. Smith, deceased, for and on account of the conscious pain and suffering of A. L. Smith, between the time of injuries alleged to have been caused by the negligence of the defendants and the time of the death of A. L. Smith, alleged to have resulted from such injuries.

[fol. 10] Petitioners further aver and allege that prior to the filing of said amended petition, the plaintiff had not in

this action claimed, or ask [asked] for judgment for an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and that by filing said amended petition, the plaintiff for the first time in this action alleged damages in excess of the sum of Three Thousand ($3,000.00) Dollars, and for the first time in this action sought a judgment against the defendants for an amount in excess of Three Thousand ($3,000.00) Dollars, and in said amended petition, the plaintiff set out and alleged a cause of action for the recovery of the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of the widow and children alleged to be the next of kin of A. L. Smith, deceased, which is a new, different, distinct and additional cause of action and not mentioned or referred to in plaintiff's original petition, in this action, and upon the filing of said amended petition, this action first became a controversy involving an amount in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, and an action subject to removal to the Court of the United States under the Constitution of the United States and Acts of Congress, pursuant thereto, and that said amended petition was filed in this action with the wrongful, and fraudulent purpose of ousting the Courts of the United States of jurisdiction to hear, try and determine the controversy existing between the plaintiff and these defendants, as set out in plaintiff's first cause of action in said amended petition, as heretofore adjudicated as between the parties hereto, as hereinafter set out, and with the wrongful and fraudulent purpose, on the part of the plaintiff, to deprive the defendants, your petitioners herein, of the rights and privileges guaranteed to them by the Constitution and laws of the United States to have this controversy heard, tried and determined by the District Court of the United States, all as hereinafter set out.

II

Petitioners aver and allege that, under the statutes of the State of Oklahoma, they, as defendants in said action, have twenty (30) [20] days from the filing of said amended petition in which to appear, plead, demur to, or answer said amended petition, and that under the order of this Honorable Court, permitting the filing of said amended [fol. 11] petition over the objection of these defendants,

and petitioners, they have twenty (20) days from May 15, 1929 in which to appear and plead, or demur to, or answer said amended petition, and that the time so allowed the defendants under the practice and laws of the State of Oklahoma, and rules and order of this Court, for these petitioners to appear and plead, or demur to, or answer said amended petition has not elapsed.

III

Your petitioners aver and allege that this is a controversy between citizens of different states, and that more than Three Thousand ($3,000.00) Dollars, exclusive of interest and costs is involved herein, and that said action is brought by the plaintiff for the alleged negligence of the defendants resulting in personal injuries to A. L. Smith, also known and referred to herein as Archie Lee Smtih, and for the death of said A. L. Smith alleged therefore resulted from such injuries, and in plaintiff's first cause of action it is alleged that by reason of the death of A. L. Smith, his widow, and children, being the next of kin, have been damaged in the sum of One Hundred Thousand ($100,000.00) Dollars, and praying therein for judgment against defendants, these petitioners for the benefit of said next of kin for the sum of One Hundred Thousand ($100,000.00) Dollars, and in plaintiff's second cause of action it is alleged that the said A. L. Smith, between the time of his injuries and death endured conscious pain and suffering and damage in the amount of Three Thousand ($3,000.00) Dollars, and in said cause of action the plaintiff prays judgment against defendants, these petitioners, for the benefit of the estate of A. L. Smith, deceased, in the sum of Three Thousand ($3,000.00) Dollars and costs of the action, and that this controversy therefore involves the sum of One Hundred and Three Thousand ($103,000.00) Dollars, exclusive of interest and costs.

Your petitioners further aver and allege that in this action there is a controversy between citizens and residents of different states, in this, to-wit: That the defendant and petitioner, Fitzsimmons Drilling Company, Incorporated, is a corporation duly organized, created and existing under the laws of the State of Louisiana, with its principal place of business at Shreveport in said state, and

that it was at the commencement of this action, at all times since, and is now a resident and citizen of the State of [fol.12] Louisiana; that the defendant, Atlantic Oil Producing Company, is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware with its principal place of business at Wilmington in said state, and was at the commencement of this action, ever since and now is a resident and citizen of the State of Delaware; that while it is alleged in plaintiff's amended petition that the plaintiff is a resident and citizen of the State of Louisiana, the first alleged cause of action set out said amended petition, and being for the first time alleged, asserted and claimed in this action, and in an amount such as would give to the Courts of the United States jurisdiction of removal, is for the sole use and benefit of Lillian Smith, who is the same person as Mrs. A. L. Smith, referred to and mentioned herein, and the widow of A. L. Smith, deceased, and Donna G. Smith and Welford Lee Smith, children of A. L. Smith, deceased, and that the said Lillian Smith, Donna G. Smith, and Welford Lee Smith were each and all at the time mentioned in said amended petition, at the time of the commencement of this action, at all times since, and at the time of the filing of said amended petition, at the time of the commencement of this action, at all times since, and at the time of the filing of said amended petition, and now are actual residents and citizens of the State of Oklahoma, with their home in the town of Cleveland in Pawnee County in said state, and that said, A. L. Smith, deceased, mentioned and referred to in said amended petition, and in this petition as Archie Lee Smith, was for many years prior to his death, an actual resident and citizen of the State of Oklahoma, with his home at Cleveland in Pawnee County in said State, and that the alleged causes of action set out in plaintiff's amended petition arose and accrued, according to the allegations of said amended petition, wholly within the State of Oklahoma.

Petitioners further aver and allege that according to the allegations of plaintiff's amended petition, said A. L. Smith was injured in an explosion that occurred in Seminole County, Oklahoma about 10:00 o'clock P. M. May 24,

1927, and died as a result of said injuries about 7:00 o'clock A. M. May 25, 1927.

Petitioners further allege and aver that on June 28, 1927, Mrs. A. L. Smith filed in the County Court in and for Cleveland County, State of Oklahoma, her petition for [fol. 13] letters of administration of the estate of Archie Lee Smith, deceased, alleging that at the time of his death, Archie Lee Smith was a resident of Pawnee County, Oklahoma, that Mrs. A. L. Smith was the widow, and Donna Gail Smith was the daughter, and Welford Lee Smith was the son, and the three (3) constituted the sole heirs-at-law of Archie Lee Smith, deceased, and were residents of Pawnee County, Oklahoma. On August 1, 1927, by order of said Court, Mrs. A. L. Smith was appointed administratrix of the estate of Archie Lee Smith, deceased, and thereupon qualified by giving bond and taking oath, and on the same day letters of administration were issued to her by said County Court.

On October 27, 1927, an action was commenced in the District Court of Oklahoma County, State of Oklahoma, being Case Number 54,159 in said Court, wherein Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, was plaintiff, and Fitzsimmons Drilling Company, incorporated, a corporation, Atlantic Oil Producing Company, a corporation, John C. Diver, Glenn Kahle and William A. Snyder, were defendants, that in said action it was alleged that the plaintiff was the duly appointed qualified, and acting administratrix of the estate of A. L. Smith, deceased, who died in the State of Oklahoma on May 25, 1927 at about 7:00 o'clock A. M. on account of injuries, negligently inflicted upon him by the defendants at or about 10:00 o'clock P. M. on May 24, 1927, and that said suit was brought for damages for the wrongful death of the deceased and for the use and benefit of the next of kin of the deceased, and that all of the next of kin were Lillian Smith, age thirty-two (32), widow, Donna G. Smith, daughter, age six (6), Welford Lee Smith, son, age sixteen (16) months, that the plaintiff was a resident and citizen in good faith of the State of Oklahoma, that the deceased on May 24, 1927, with other employees of the corporate defendants, were engaged in work on a well being drilled by the corporate defendants in

Seminole County, Oklahoma, and on said date at about 10:00 o'clock P. M. A. L. Smith was injured and burned in an explosion and fire at said drilling well, resulting from negligence of the defendants in failing to connect said well with flow tank, on account of which failure oil and gas escaped from the well and settled underneath the derrick floor, and to the ground around said drilling well and became ignited, causing such explosion, and that the death [fol. 14] of Archie Lee Smith resulted from such injuries and on account thereof his widow and children were damaged in the sum of One Hundred Thoursand [Thousand] ($100,000.00) Dollars, and praying for judgment against the above named defendants in the sum of One Hundred Thousand ($100,000.00) Dollars, and the costs of the action. For a more detailed statement of the allegations of said petition, reference is hereby made to the plaintiff's petition, which is on file as part of the records of this Court in the cause hereinabove mentioned, and as shown in the certified [certified] transcript of the records of said case on file in the United States District Court for the Western District of Oklahoma, under docket Number 3686-Law, as hereinafter set out. On November 26, 1927 notice, bond, and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company for removal to the District Court of the United States for the Western District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and the petitioning defendants, and the fraudulent joinder of the individual defendants residing in Oklahoma, were filed in said Court, and on November 28, 1927 this Court in said action made and entered an order for the removal of said cause Number 54,159 to the District Court of the United States for the Western District of the State of Oklahoma. On December 15, 1927, a duly certified transcript of the record in said case was filed in the District Court of the United States for the Western District of Oklahoma and docketed as Case Number 3686-law. On December 29, 1927, the plaintiff in said action, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, filed her motion in said United States District Court to remand said cause to the District Court of Oklahoma County, State of Oklahoma. On June 6, 1928, after a full hearing and

consideration of said motion, said United States District Court, finding that it had full and complete jurisdiction of said action, made and entered its order overruling said motion to remand and on July 6, 1928, the plaintiff in said action filed a dismissal thereof.

Petitioners further aver and allege that on July 8, 1928, that being the same day on which the plaintiff dismissed said former action in said United States District Court, the said Mrs. A. L. Smith, or Lillian Smith, administratrix of [fol. 15] the estate of A. L. Smith, deceased, as plaintiff, commenced the second action in the District Court of Oklahoma County, State of Oklahoma, naming as defendants, the same identical persons and corporations as were named as defendants in the former suit, said second case being entered and docketed in said District Court of Oklahoma County, as case Number 56,098. In the plaintiff's petition in said case Number 56,098 the materials alleged are the same as the plaintiff's allegations in said former suit, and the recovery sought was identically the same, and for the benefit of the same parties. For a more detailed statement of such allegations, petitioners refer to the petition in said case Number 56,098 now on file and among the records of the District Court of Oklahoma County, and also shown by the certified transcript of the record of said case on file in the District Court of the United States for the Western District of Oklahoma under docket Number 3819-law, as hereinafter set out. On August 4, 1928, notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company to remove said cause to the United States District Court for the Western District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and said petitioners, and a fraudulent joinder of the individual defendants, residents of the State of Oklahoma were filed. On August 6, 1928, the District Court of Oklahoma County, State of Oklahoma, on consideration of said petition for removal made and entered its order for the removal of said cause as prayed. On August 22, 1928 a certified transcript of the record in said case was filed in the District Court of the United States for the Western District of the State of Oklahoma, and docketed in said Court as case Number 3819-law. On August 28, 1928 the plaintiff in action, Mrs. A. L. Smith, or Lillian Smith, ad-

ministratrix of the estate of A. L. Smith, deceased, filed her motion to remand said cause to the District Court of Oklahoma County, State of Oklahoma. On November 15, 1928, after the hearing and consideration of said motion to remand, the said United States District Court finding that said Court had full and complete jurisdiction of said cause, overruled plaintiff's motion to remand, and on December 6, 1928 the plaintiff to nullify the order of said United States District Court and to avoid the jurisdiction of said Court dismissed said action.

[fol. 16] Petitioners further aver and allege that on July 9, 1928 in disregard and defiance of the order of said United States District Court for the Western District of Oklahoma, determining and adjudicating that said Court had jurisdiction of said cause docketed in said Court as case Number 3686-law, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, as plaintiff, commenced another action in the District Court of Tulsa County, State of Oklahoma against the same identical defendants named in the two former suits, in which she alleged the same material facts, prayed for same recovery and for the benefit of the same next of kin, as alleged and sought in her two former petitions. For a more detailed statement of the allegations in said petition, reference is hereby made to a copy of the petition, which is attached hereto, marked Exhibit "A" and made a part of this petition, and the said action so commenced was entered and docketed in said District Court of Tulsa County, as case Number 43,033. On August 6, 1928 notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, for removal of said cause to the District Court of the United States for the Northern District of Oklahoma on the ground of a diversity of citizenship between the plaintiff and petitioners, and the fraudulent joinder of the individual defendants, who were residents of Oklahoma, were filed. On August 9, 1928, upon a consideration of said notice, bond and petition for removal, the District Court of Tulsa County, State of Oklahoma, made and entered its order for the removal of said cause to said United States District Court as prayed. On the 5th day of Sept., 1928 a certified transcript of the record of said case was filed in the District Court of the United States for the

Northern District of Oklahoma, and was entered and docketed as case Number 730-law. On the 12th day of Sept., 1928 the plaintiff filed in said United States District Court her motion to remand said cause to the District Court of Tulsa County. On December 13, 1928, upon the hearing and consideration of said motion to remand, the United States District Court for the Northern District of Oklahoma found that said Court had full and complete jurisdiction of said cause and made and entered its order overruling the plaintiff's motion to remand, and on December 13, 1928, the plaintiff, Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, dismissed said action, [fol. 17] having previously, on December 10, 1928, in order to avoid and nullify and render ineffectual the two former adjudications of the District Court of the United States for the Western District of Oklahoma, and the anticipated adjudication of the District Court of the United States for the Northern District of Oklahoma, to the effect that said United States District Courts had full and complete jurisdiction of said causes hereinabove mentioned, and with the wrongful and fraudulent purpose of depriving these petitioners, who were defendants in each of said actions, of the rights and privileges guaranteed to them by the Constitution and laws of the United States, and after she had purported to act as administratrix of the estate of A. L. Smith, deceased for a year and a half, fraudulently and w-ongfully filed in the County Court of Pawnee County, Oklahoma, and in probate case Number 143, in which the administration of the estate of A. L. Smith, deceased, was pending, an instrument, designating "resignation of administratrix and request for appointment of William H. Mecom, as succeeding administ-ator," in which she purported to resign as administratrix of the estate of A. L. Smith, deceased, and requested the appointment of William H. Mecom, an attorney-at-law of Columbia, Louisiana as her successor, and on the same day the said William H. Mecom, by Roy F. Ford, as attorney, who is the same attorney who had represented and appeared for Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, in each of the three (3) actions filed

against these petitioners, and hereinabove specifically mentioned, filed his petition for letters of administration of the estate of Archie Lee Smith, deceased, who was the same person as A. L. Smith, alleging that he, the said William H. Mecom was a resident of Columbia, Louisiana, and representing that he was a friend of the family of said deceased, A. L. Smith, or Archie Lee Smith, and on the same day, to-wit: December 10, 1928, Charles Besly, County Judge of Pawnee County, Oklahoma, and Judge of the County Court in and for Pawnee County, Oklahoma, made and entered an order appointing the said William E. Mecom of Columbia, Louisiana as administrator of the estate of said Archie Lee Smith, or A. L. Smith, reciting "and his widow Lillian Smith having resigned as administratrix and requesting the appointment of William H. Mecom," and letters of administration of the estate of Archie Lee Smith, [fol. 18] or A. L. Smith, were issued to said William H. Mecom, pursuant to said resignation and request and said order of appointment and on December 10, 1928. Petitioners further aver and allege that the said resignation of Mrs. A. L. Smith, or Lillian Smith, who are one and the same person, a resident of Pawnee County, State of Oklahoma, as administratrix of the estate of A. L. Smith, deceased, and her request for the appointment of William H. Mecom, attorney-at-law of Columbia, in the State of Louisiana, which state is the residence and domicile of the petitioner, Fitzsimmons Drilling Company, incorporated, and the procuring of the appointment of the said William H. Mecom, as administrator of the estate of Archie Lee Smith, or A. L. Smith, deceased, was for the wrongful and fraudulent purpose of instituting another and further action on the same identical cause of action which had been started and alleged in the three (3) suits already filed, in such manner as to prevent these petitioners from exercising and availing themselves of the rights and privileges guaranteed to them by the Constitution and laws of the United States to have the action against them to recover damages for the benefit of the widow and children of A. L. Smith, deceased, heard, tried and determined in the Courts of the United States, rather than in the Courts of the State of Oklahoma, of which the deceased, the then administratrix of the estate, and the widow and children and next of kin of A. L. Smith,

deceased, were actual and bona fide residents and citizens, and for the purpose of avoiding, nullifying and rendering ineffectual the orders and adjudications of the said United States District Courts, which had already been made, and the further order which was then anticipated of finding and holding that the said United States Courts had jurisdiction of the above mentioned cause of action. That petitioners further aver and allege that the said William H. Mecom is, and was in no way related to, or even acquainted with A. L. Smith in his life time, or with any member of the family of A. L. Smith, and that p-ior to the time of his appointment, as administrator, he had never even seen A. L. Smith, or the widow or children of A. L. Smith, that he does not now have any interest, as a next of kin, heir-at-law, or relationship to any of the next of kin or heirs-at-law, or as a creditor of the estate of A. L. Smith, deceased, that he filed his petition, or letters of administration, as above set out at the request of Roy F. Ford, who had, as attorney for Mrs. A. L. Smith, [fol. 19] or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, previously filed three (3) separate actions against these petitioners, and for the sole and only purpose of avoiding the rightful and proper jurisdiction of the United States Courts of the cause of action which had been previously procured. Petitioners further aver and allege that all cause, or causes of action, and all right, or rights of action for and on account of the injuries to, or death of A. L. Smith, deceased, had prior to December 10, 1928 fully accrued to and rested in Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, an actual resident and citizen of Pawnee County, State of Oklahoma, for the benefit of the widow and children of A. L. Smith, deceased, residents and citizens of said Pawnee County, State of Oklahoma, and that having three (3) times procured actions on said cause of action, as hereinabove set out, the said resignation of Mrs. A. L. Smith, or Lillian Smith, as such administratrix, with the request for the appointment of William H. Mecom, a resident of Columbia, Louisiana, and the securing of the appointment of said William H. Mecom and the issuing of letters of administration to him, as such administrator, was in effect and constituted an assignment and transfer of said cause, or causes of action, and said right, or rights of action from

the said Mrs. A. L. Smith, or Lillian Smith, administratrix, a resident and citizen of the State of Oklahoma, to the said William H. Mecom, administrator, a citizen and resident of the State of Louisiana, for the wrongful and fraudulent purpose of attempting to evade and avoid the jurisdiction of the Courts of the United States, to hear, try and determine the controversy between the personal representative of A. L. Smith, deceased, and these defendants, growing out of the injuries to and death of A. L. Smith, deceased.

Petitioners further aver and allege that in pursuance of the wrongful and fraudulent plan and design, as hereinabove set out, the said William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, as plaintiff, on January 5, 1929, commenced a fourth action in the District Court of Oklahoma County, State of Oklahoma, being case Number 57,527, against these petitioners, Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, by filing his petition with all of the material [fol. 20] allegations therein, the same as the allegations in the petitions previously filed in the name of Mrs. A. L. Smith, or Lillian Smith, administratrix of the estate of A. L. Smith, deceased, and praying for the recovery from these petitioners of the sum of One Hundred Thousand ($100,000:00) Dollars for the sole use and benefit of the widow and children of A. L. Smith, deceased, all of which more fully appears from the petition so filed, and which is now a part of the record of this Court, and which also appears from the certified transcript of the records on file in the District Court of the United States for the Western District of the State of Oklahoma, in case Number 3942-law in said Court, to both of which reference is hereby made. On February 4, 1929 notice, bond and petition of Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, for the removal of said cause to the District Court of the United States for the Western District of Oklahoma, were filed and on the same day the District Court of Oklahoma County, upon consideration thereof, made and entered its order for the removal of said cause, as prayed. On February 28, 1929 a certified transcript of the record in said cause was duly filed in the District Court of the United States for the Western District of Oklahoma and docketed therein as case Number 3942-law. On March 4, 1929, the plaintiff, William H. Mecom,

administrator, filed his motion to remand said cause to the District Court of Oklahoma County. On May 7, 1929 upon hearing and consideration of said motion, said District Court of the United States determined and adjudicated that said court had full and complete jurisdiction of said action, and made and entered its order overruling plaintiff's motion to remand, and requiring plaintiff to make a cost deposit or file a cost bond in said action, and the plaintiff in open court refusing to comply with the order of said United States District Court, the said Court made and entered its order dismissing said action.

Petitioners further aver and allege that on January 26, 1929 William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, as plaintiff commenced this action in the District Court of Oklahoma County, Oklahoma against these petitioners, Fitzsimmons Drilling Company, incorporated, and Atlantic Oil Producing Company, as defendants, with all of the material allegations of the petition the same as the material allegations of the petitions in the four (4) suits previously filed, and hereinabove [fol. 21] described and supplementing said allegations with the further allegation that Archie Lee Smith from the time he was injured to the time of his death endured conscious pain and suffering, sustaining damage in the sum of Three Thousand ($3,000.00) Dollars, and praying judgment against these petitioners for the sum of Three Thousand ($3,000.00) Dollars for the benefit of the estate of Archie Lee Smith, deceased, all of which more fully appears in the petition on file in this action, to which reference is hereby made. On April 19, 1929 the defendant, Atlantic Oil Producing Company filed its answer, and on April 30, 1929, the defendant, Fitzsimmons Drilling Company, incorporated, filed its answer. On May 15, 1929, this case coming regularly on for trial, and a jury having been called into the jury box, the plaintiff, over the objection of defendants, these petitioners, each of whom at the time reserved their right and privilege of filing petitions to remove this action to the District Court of the United States for the Western District of Oklahoma, was given leave to file amended petition, and said amended petition was filed, and therein the plaintiff alleged two (2) causes of action against these petitioners, the first cause of action containing all of the material allegations found in the petitions in the four (4)

suits previously filed against these petitioners, as hereinabove described, and alleging that by reason of the wrongful death of Archie Lee Smith, his widow and children being his next of kin, were damaged in the sum of One Hundred Thousand ($100,000.00) Dollars, and praying a recovery against these petitioners for the sum of One Hundred Thousand ($100,000.00) Dollars for the benefit of the said widow and children, and in said second cause of action, by reference and adoption made the same allegations as in said other suits, supplementing the same by allegations of the conscious pain and suffering of the deceased between the time of his injuries and his death, by reason of which he was damaged in the sum of Three Thousand ($3,000.00) Dollars, and praying recovery from these petitioners for the sum of Three Thousand ($3,000.00) Dollars for the use and benefit of the estate of Archie Lee Smith, and in said amended petition, the plaintiff included a general prayer for judgment on both causes of action in the sum of One Hundred and Three Thousand ($103,000.00) Dollars, all of which more fully appears from said amended petition now on file in this action, to which reference is hereby made.

[fol. 22] Petitioners further aver and allege that the matters and things hereinabove set out constitute a wrongful and fraudulent scheme, plan and device concieved, [conceived] instigated and prosecuted by the said Mrs. A. L. Smith or Lillian Smith, and William H. Mecom and Roy F. Ford, who has appeared for both of them as their attorney for the purpose of avoiding the rightful and proper jurisdiction of the Courts of the United States over this controversy, concerning which jurisdiction the orders made by the said United States Courts, as hereinabove set out, constitute final and conclusive adjudications, and for the purpose of avoiding and thwarting the orders and adjudications of said United States Courts, and for the further purpose of attempting to render said orders inoperative and ineffectual, and for the further purpose of denying to these petitioners their rights and privileges of invoking jurisdiction of said United States Court.

## IV

Your petitioners herewith present a good and sufficient bond, as provided by the statutes in such case made and provided, that it will enter in such United States District

Court for the Western District of Oklahoma, within thirty (30) days from the filing of this petition, a certified copy of the record in this case, and that they will pay all costs which may be awarded against them by said Court, if the United States District Court for the Western District of Oklahoma shall hold that this cause was wrongfully or improperly removed thereto.

The premises considered, your petitioners therefore pray that this court proceed no further herein, except to make its order of removal as required by law, and to accept the bond presented herewith, and direct transcript of the record herein to be made for said Court, as provided by law, and as in duty bound, your petitioners will ever pray.

Fitzsimmons Drilling Company, Inc. H. C. Thurman, Ray S. Fellows, Its Attorneys. Atlantic Oil Producing Company, by Hagan & Gavin, George F. Short, Its Attorneys.

[fol. 23] *Duly sworn to by H. C. Thurman and George F. Short. Jurats omitted in printing.*

[fol. 24] [File endorsement omitted.]

---

NOTE RE BOND FOR REMOVAL

(Bond for removal, with defendants as principals and American Employers' Insurance company as surety, in the sum of $500, approved by Sam Hooker, District Judge, was filed in the District Court of Oklahoma County, Oklahoma, June 4, 1929.)

---

IN DISTRICT COURT OF OKLAHOMA COUNTY

ORDER OF REMOVAL—Filed June 12, 1929

This cause coming on for hearing on the petition and bond of the defendants, Fitzsimmons Drilling Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a corporation, for an order removing and transferring this cause to the District Court of the United States for the Western District of Oklahoma, and it ap-

pearing to the Court that the petitioners have filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said petitioners defendants, as aforesaid, have given the plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for the removal to the United States District Court.

Now, Therefore, said petition and bond are hereby approved, and it is hereby ordered and adjudged that this cause be, and it is hereby removed and transferred to the District Court of the United States for the Western District of the State of Oklahoma, and the Court Clerk is hereby directed to make up and certify the record in said cause forthwith for transmission to said Court.

Done in open court, this 12 day of June, 1929.

Sam Hooker, District Judge.

[fol. 25] [File endorsement omitted.]

---

Clerk's certificate to foregoing transcript omitted in printing.

---

IN UNITED STATES DISTRICT COURT

MOTION TO REMAND—Filed July 20, 1929

Comes now the plaintiff above named, and appearing specially for the purpose of this motion and for no other purpose, and moves the Court to remand the above entitled action to the State Court, from whence it was removed to this Court, on the ground and for the reason that the plaintiff at the time of the institution of the above entitled action in the State Court, and at the time of the filing of the Amended Petition in said cause, to-wit, on May 15, 1929, he was a bona fide resident and citizen of the State of Louisiana, and that the defendant, Fitzsimmons Drilling Company, at the time of the institution of said action, and at all times since, was a bona fide resident and citizen of the State of Louisiana, and that under the holding of the Supreme Court of the United States in the case of Memphis Street Railway Co. v. S. C. Moore, Admr. 243 U. S. 299; 37 Sup. Ct. Rep. 273, and various decisions of other in-

ferior courts, this Court has no jurisdiction of the parties to this action, nor of the subject matter.

[fol. 26] Plaintiff further in support of this motion states that he was legally appointed administrator of the estate of Archie Lee Smith, deceased, by the County Court of Pawnee county, State of Oklahoma, at the time the above entitled action was instituted, and at all times since has been acting as such administrator, and that said appointment was made in pursuance of the provisions of the Probate Code of the State of Oklahoma. That he was requested so to act by Mrs. A. L. Smith, widow of the deceased, and that the widow in requesting the appointment of this plaintiff as administrator of her deceased husband's estate acted within her legal rights granted by the Probate Code as aforesaid, and that no fraud was practiced upon the defendants herein by said appointment, either by the plaintiff or the widow of said deceased, as they merely pursued the legal rights given them by the Probate Statutes of the State of Oklahoma.

That under the authority of the City of Detroit, Mich. v. Blanchfield, 13F. (2d) 13, and other inferior courts, this Court has no authority or jurisdiction to inquire into the motive for the appointment of said administrator, as the County Court of the State of Oklahoma was vested with exclusive jurisdiction to make the appointment, and that the Federal Court has no probate jurisdiction whatever, nor any authority or jurisdiction to investigate or inquire into the motive or reason for the appointment of an administrator by a probate court of the State of Oklahoma.

Plaintiff herein specifically denies all the allegations contained in defendants' petition for removal, which are inconsistent with or contradictory to the allegations contained in this motion to remand and the allegations contained in plaintiff's amended petition on file in this action.

Plaintiff further states that the defendants have heretofore waived their right to remove this case to the Federal Court, on the ground and for the following reasons, to-wit: That at the time the amended petition was filed in this cause in the State Court, the defendants instead of immediately asking leave for time to file a petition and bond for removal in said cause, recognized the jurisdiction of the State Court and requested the State Court to continue the case and to grant them twenty days in which to plead to

the amended petition, and that such acts and conduct on the part of the said defendants constituted a waiver of [fol. 27] their rights to remove this case from the State Court to the Federal Court.

Wherefore, plaintiff prays that said cause be remanded to the State Court, from whence it was removed.

A. M. Meyer & Ford & Montgomery, Attorneys for Plaintiff.

*Duly sworn to by Roy F. Ford. Jurat omitted in printing.*

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

RESPONSE TO MOTION TO REMAND—Filed Sept. 6, 1929

Come now the defendants and for response to plaintiff's motion to remand, deny all of the allegations therein contained, which are contrary to and in conflict with the allegations of these defendants in their petition for removal.

These defendants specifically state that William H. Mecom, at the time it is alleged he was appointed administrator of the estate of Archie Lee Smith, was, and still is, a stranger to Mrs. A. L. Smith, widow of Archie Lee Smith, deceased, and that the said Mrs. A. L. Smith had not, at that time nor at any time since, had any communication, [fol. 28] written or oral, with the said William H. Mecom, and that the said William H. Mecom was never requested by the said Mrs. A. L. Smith, to act as administrator of the estate of Archie Lee Smith, deceased, but consented to act as such administrator solely as an accom-odation [accommodation] and favor to the attorneys Ford and Montgomery, who were then engaged in the prosecuting of a damage suit against these defendants on account of injuries to and death of Archie Lee Smith.

These defendants further specifically allege and state that on May 15, 1929, when the plaintiff asked leave to file the amended petition herein, H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, made an objection to the filing of said amended petition, at the time

specifically reserving to Fitzsimmons Drilling Company the right to object to the jurisdiction of the court as to the additional cause of action in said amended petition, and the right to exercise the privilege of removal, and, thereupon, George F. Short, one of the attorneys for the Atlantic Oil Producing Company, adopted said objection as the objection of Atlantic Oil Producing Company. That, thereupon, the court permitted the filing of the amended petition, and, on its own motion, made an order continuing the case.

These defendants further state, that in the informal discussion following said order, and pursuant to the reservation made by the defendants of their right to exercise the privilege of removal, the court inquired how long the defendants wanted to plead, and the said H. C. Thurman merely stated that where an entirely new cause of action was brought in by amendment, the defendants ought to be given the statutory time of twenty days, intending thereby to merely inform the court of the contention of counsel, that upon the filing of an amended petition complete in itself, and stating a new cause of action, the statutes of the State of Oklahoma gave to the defendants twenty days in which to file their petition for removal, the same as the time allowed by statute for the return day of summons, and these defendants allege and state that neither of them, by any representative or attorney, asked for a continuance of said case or asked for time to plead, but at all times expressly reserved the right to exercise the privilege of removal, all of which more fully appears from a transcript of the proceedings of the District Court of Oklahoma County, State of Oklahoma, verified by the affidavit of Henry B. Walker, [fol. 29] official court reporter, which is attached hereto as exhibit "A."

Fitzsimmons Drilling Company, Inc., by H. C. Thurman, Ray S. Fellows; Its Attorneys. Atlantic Oil Producing Company, by George F. Short, Hagan & Gavin, Its Attorneys.

State of Oklahoma,
Oklahoma County, ss:

George F. Short, being first duly sworn on oath says: That he is one of the attorneys for Atlantic Oil Producing Company, one of the defendants in the cause of William H. Mecom, Administrator, plaintiff, vs. Fitzsimmons Drilling

Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma and which on removal was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy F. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court, in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

[fol. 30] George F. Short.

Subscribed and sworn to before me this 6th day of September, 1929. Earl J. Newlin, Deputy Clerk, U. S. District Court, Western District of Oklahoma. (Seal.)

STATE OF OKLAHOMA,
Oklahoma County, ss:

T. Austin Gavin, being first duly sworn on oath says: That he is one of the attorneys for Atlantic Oil Producing Company, one of the defendants in the cause of William H. Macom, Administrator, plaintiff, vs. Fitzsimmons Drilling Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma, and which, on removal, was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy E. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court, in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

T. Austin Gavin.

Subscribed and sworn to before me this 6th day of September, 1929. Earl J. Newlin, Deputy Clerk, U. S. District Court, Western District of Oklahoma. (Seal.)

[fol. 31] STATE OF OKLAHOMA,
Oklahoma County, ss:

H. C. Thurman, being first duly sworn on oath says: That he is one of the attorneys for Fitzsimmons Drilling Company, Inc., one of the defendants in the cause of William H. Mecom, Administrator, plaintiff, vs. Fitzsimmons Drilling Company, Inc., et al., defendants, filed and docketed as case #57,713, in the District Court of Oklahoma County, State of Oklahoma, and which, on removal was filed and docketed as #4032—Law, in the District Court of the United States for the Western District of Oklahoma.

Affiant further states that on May 15, 1929, he was present in the District Court of Oklahoma County, State of Oklahoma, and in the division thereof, of which Honorable

Wyley Jones was presiding judge; that said case was called for trial and twelve members of the jury panel called into the jury box for examination; that, thereupon, plaintiff's attorney, Roy F. Ford, asked leave to file an amended petition and H. C. Thurman, one of the attorneys for Fitzsimmons Drilling Company, specifically reserving objections to the jurisdiction of the court, and specifically reserving the right to exercise the privilege of removal, objected to the filing of said amended petition; that said amended petition was permitted to be filed and the court in granting said permission, on its own motion continued said case and granted the defendants twenty days to plead without any prayer or request therefor, by or on the part of either of the defendants, but upon the statement of H. C. Thurman, that the defendants were not ready for trial and, that under the statute, were entitled to twenty days to plead.

Further affiant sayeth not.

H. C. Thurman.

Subscribed and sworn to before me this 6th day of September, 1929. Allie Peters, Notary Public. My commission expires June 29, 1933. (Seal.)

---

[fol. 32] TRANSCRIPT OF PROCEEDINGS BEFORE HON. WYLEY JONES, JUDGE, MAY 15, 1929

The Court: Now, gentlemen, what sort of record do you want to make in this matter?

Mr. Ford: Well, I was just asking to file an amended petition in the case.

The Court: Is there any objection to it?

Mr. Thurman: The defendant, The Fitzsimmons Drilling Company objects to it for the reason that this case has been called for trial and the jury is in the box and the amended petition states a new, separate and distinct cause of action from that contained in the original petition; further, that the amended petition purports to state a cause of action of which this court is without jurisdiction and that the amended petition or the amendment presented seeks to prevent the defendants from exercising their right

in presenting a petition for removal, the original action not being subject to removal and the defendant makes this objection reserving to itself the right to object to the jurisdiction of the court as to this additional cause of action and the right to exercise the privilege of removal.

Mr. Short: The Atlantic Oil Producing Company, defendant in this cause joins in the objection of the Fitzsimmons Drilling Company and adopts the same as its own.

The Court: Of course, I understand the rule is in this jurisdiction, a man may amend his pleadings any time. I know of no reason why and I think plaintiff is entitled to file his amended petition if he desires to do so and I think the defendants are entitled to a continuance, and the amended petition will be filed and the defendants, of course are granted a continuance of the lawsuit if they wish it.

Mr. Thurman: Your Honor will let the record show each of the defendants except.

The Court: Each of the defendants excepts and exceptions are allowed. Now, I understand from counsel you are not ready for trial.

Mr. Thurman: No, we are not.

The Court: How long do you want to plead to this amended petition?

[fol. 33] Mr. Thurman: I think if an entirely new cause of action is brought in here we ought to be given the statutory time of twenty days.

Mr. Ford: There is no objection to that.

The Court: Twenty days, then, in which to plead to the amended petition.

STATE OF OKLAHOMA,
Oklahoma County, ss:

I, Henry B. Walker, of lawful age, being first duly sworn on oath say, that I am now and was on May 15, 1929 one of the official reporters in the District Court of the Thirteenth Judicial District in Oklahoma County, State of Oklahoma; that on the above date, I was called into the court room of Honorable Wiley Jones, District Judge, and directed to take in shorthand the statement of H. C. Thurman and others and the ruling of the court in a proceeding being had in case #57,713, William H. Mecom, Administrator, vs. Fitzsimmons Drilling Company, et al., and the

above and foregoing is a full, true and correct transcript of my stenographic notes showing all that was said and done in connection with said matter, on the date aforesaid.

Further affiant sayeth not.

Henry B. Walker.

Subscribed and sworn to *me* before me this 29th day of August, 1929. Allie Peters, Notary Public. My commission expires June 29, 1933. (Seal.)

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION TO REMAND—Filed Sept. 6, 1929

Now on this 6th day of September, 1929, the above styled cause coming regularly on for hearing on the motion of the plaintiff to remand, and the court having heard the evidence offered, consisting of the proceedings in the matter of the estate of Archie Lee Smith, deceased, in the County Court of Pawnee County, State of Oklahoma, and the deposition of William H. Mecom and the affidavits attached to the response to the motion to remand and the verified tran- [fol. 34] script of the proceedings before Honorable Wyley Jones, Judge of the District Court in and for Oklahoma County, State of Oklahoma, and the agreement of the parties that the petition for removal contained a true and correct statement of the proceedings in the several prior actions to recover damages for the death of Archie Lee Smith, deceased, and the court having heard the arguments of counsel and being sufficiently advised finds that the allegations of the petition for removal are sustained and plaintiff's motion to remand should be overruled, to which the plaintiff excepts.

It is therefore Considered, Ordered and Adjudged that the plaintiff's motion to remand this case to the District Court in and for Oklahoma County, State of Oklahoma be and the same is hereby overruled, to which the plaintiff excepts.

On the same day there comes on for hearing the motion of the defendants to strike and the court having heard the argument of counsel and being sufficiently advised:

It is Considered, Ordered and Adjudged that the motion to strike be overruled, to which the defendants and each of them except, and it is further ordered that the defendants be allowed twenty days in which to file their answers herein.

Edgar S. Vaught, District Judge

O. K. Ford & Montgomery & A. H. Meyer, Attorneys for Plaintiff.

O. K. H. C. Thurman, Attorney for Defendant Fitzsimmons Drilling Co.

O. K. George F. Short, Attorney for Defendant Atlantic Oil Producing Co.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF DEFENDANT FITZSIMMONS DRILLING COMPANY TO PLAINTIFF'S AMENDED PETITION—Filed Dec. 26, 1929

Comes now the defendant, Fitzsimmons Drilling Company, by leave of court first had and obtained, files this, its [fol. 35] answer to the first cause of action to plaintiff's amended petition and for its answer alleges and states:

I

This defendant denies all of the allegations in plaintiff's amended petition contained except such as are hereinafter specifically admitted.

II

This defendant admits that it is a corporation.

III

This defendant admits that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition was, as driller, in charge of, and working upon an oil well and was a man of large and extensive experience in his particular line of work, that said well had from time to time

prior to the accident complained of, been producing oil and gas and that said Archie Lee Smith had the full right and authority to shut down and discontinue the operation at said well whenever oil and gas was flowing, or about to flow from said well, and the full right and authority to exercise his own independent judgment as to the time of firing the boiler, or resuming operations at said well after oil and gas ceased to flow therefrom, that the said Archie Lee Smith had full and complete information and knowledge of all of the conditions at, in, and about said well, and all of the dangers connected with, or surrounding the work being done by Archie Lee Smith, were open, obvious and known to said Archie Lee Smith, and that by accepting said employment and continuing therein, and in doing the work which he was doing prior to, and at the time of said accident, the said Archie Lee Smith assumed all the risks of causing an explosion, and being injured as he was injured, and on account thereof this defendant is not liable to the plaintiff herein.

IV

For further defense this defendant alleges and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's petition was working on or about an oil well described in the petition when the explosion and fire occurred, that just prior to and at the time of said explosion and fire, that said Archie Lee Smith was guilty of negli-
[fol. 36] gence and carelessness, which either caused or contributed to the said explosion and fire, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under all of the surrounding circumstances and on account thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered this defendant prays that the plaintiff take nothing as against this defendant by reason of this action.

Fitzsimmons Drilling Company, by H. C. Thurman,
Its Attorney.

And comes now the defendant, Fitzsimmons Drilling Company, by leave of court first had and obtained, files this its answer to plaintiff's second cause of action to plaintiff's amended petition, and for its answer alleges and states:

I

This defendant denies all of the allegations in plaintiff's amended petition contained except such as are hereinafter specifically admitted.

II

This defendant admits that it is a corporation.

III

This defendant admits and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition, was, as driller, in charge of, and working upon an oil well and was a man of large and extensive experience in his particular line of work, that said well had from time to time, prior to the accident complaintiff, [complained of] been producing oil and gas and that said Archie Lee Smith had the full right and authority to shut down and discontinue the operation at said well whenever oil and gas was flowing, or about to flow from said well, and the full right and authority to exercise his own independent judgment as to the time of firing the boiler, or resuming operations at said well after oil and gas had ceased to flow therefrom, that the said Archie Lee Smith had full and complete information and knowledge of all of the conditions at, in, and about said well, and all of the dangers connected with, or surrounding the work being done by Archie Lee Smith were open, obvious and known to said Archie Lee [fol. 37] Smith, and that by accepting said employment and continuing therein, and in doing the work which he was doing prior to, and at the time of said accident, the said Archie Lee Smith assumed all the risks of causing an explosion, and being injured as he was injured, and on account thereof this defendant is not liable to the plaintiff herein.

IV

For further defense this defendant alleges and states that Archie Lee Smith, deceased, at the time and place stated in plaintiff's amended petition was working on or about an oil well described in the amended petition when the explosion and fire occurred, that just prior to and at the time of said explosion and fire, that said Archie Lee Smith

was guilty of negligence and carelessness, which either caused or contributed to the said explosion and fire, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under all of the surrounding circumstances and on account thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered this defendant prays that the plaintiff take nothing as against this defendant by reason of this action.

Fitzsimmons Drilling Company, by H. C. Thurman, Its Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SEPARATE ANSWER OF THE DEFENDANT ATLANTIC OIL PRODUCING COMPANY TO PLAINTIFF'S AMENDED PETITION—Filed Oct. 5, 1929

Comes now the defendant, Atlantic Oil Producing Company, by leave of court first had and obtained, files this its answer to the first cause of action to plaintiff's amended petition and for such answer alleges and states:

1. This defendant denies all of the allegations in plaintiff's petition contained upon which said plaintiff seeks to recover damages from this defendant.

2. The defendant admits that it is a Corporation as alleged in plaintiff's amended petition, but specially denies [fol. 38] that it had any contractual relation with the deceased, Archie Lee Smith, or that the said Archie Lee Smith was at the time of his death engaged by this defendant as an employe or otherwise, and that so far as this defendant is concerned, the said Archie Lee Smith occupied the relation of an independent contractor and was an independent contractor in the drilling of the well named in plaintiff's petition and had no contract of employment by this defendant and was not the agent or employe of this defendant in any manner whatsoever; that this defendant did not have or exercise the right to employ said Archie Lee Smith

or to discharge him or any of the other employees working under the direction of the said Archie Lee Smith in the drilling of the well as described in plaintiff's petition.

3. That if the said defendant, Atlantic Oil Producing Company, did in any manner by operation of law or otherwise become the joint employer or become charged with the direction of the operations of the said Archie Lee Smith, or those working under him, (which this defendant specially denies) then and in that event the said Archie Lee Smith was fully aware of all of the risks and hazards of the drilling of said well; that he was an experienced and skilled oil well driller, and as such, assumed all of the risks and hazards of said enterprise, for which this defendant was and is in no way responsible.

4. That if this defendant by operation of law or otherwise in any manner became responsible for the direction of the work on which the deceased, Archie Lee Smith, was engaged, (which this defendant specially denies) then and in that event the accident and injury to the said Archie Lee Smith, resulting in his death, as alleged in the petition, was due to the negligence of him, the said Archie Lee Smith, or contributed to by such negligence of said deceased, for which this defendant was and is in no way responsible.

Wherefore, having fully answered as to plaintiff's count No. 1; this defendant prays that said plaintiff take nothing by reason of this action.

Atlantic Oil Producing Company, by George F. Short, C. W. King, Its Attorneys.

[fol. 39] Answer to Cause of Action No. 2

Comes now the defendant, Atlantic Oil Producing Company, by leave of Court first had and obtained, files this its answer to plaintiff's second cause of action to plaintiff's amended petition, and for such answer alleges and states:

1. That this defendant denies all of the allegations in plaintiff's amended petition contained upon which said plaintiff seeks to recover damages against this defendant.

2. This defendant admits that it is a Corporation, but denies that it was ever at any time the employer on its own account or jointly with any other corporation or per-

son, of said Archie Lee Smith, deceased; and that if the said Archie Lee Smith sustained injuries, and as a result of the injuries, died, as a result of the accident set up in said petition, then in that event the said Archie Lee Smith, deceased, was acting in the capacity of an independent contractor with parties other than this defendant and that defendant did not have or exercise any control whatsoever over the said Archie Lee Smith, or any of the other employees working under him in the matter of the drilling of the oil well as described in plaintiff's petition; that in such enterprise the said Archie Lee Smith, deceased, occupied the relation of an independent contractor and this defendant had and exercised no control whatsoever over the said Archie Lee Smith and had no power to employ or discharge the said Archie Lee Smith, and did not at any time assume to direct the actions or work of the said Archie Lee Smith or any one working under him as alleged in plaintiff's petition and the said defendant denies any responsibility whatsoever for the accident and resulting injuries of said Archie Lee Smith, deceased.

3. That if the said defendant did in any wise by operation of law or otherwise become charged with the direction of said work as alleged in plaintiff's petition, then and in that event, the said Archie Lee Smith, deceased, being an experienced and skilled oil well driller of many years' standing was fully aware of and assumed all of the danger and hazards of said undertaking and assumed the risks involved therein and this defendant denies liability for the accident and resulting injuries and death, on account of said assumption of risk by the said Archie Lee Smith.

4. That if by operation of law or otherwise, this defend-
[fol. 40] ant became charged with responsibility for the direction of said work and became the joint employer of the said Archie Lee Smith, deceased, and those working under him, then said defendant alleges, that if the said Archie Lee Smith, was injured and died as a result of the accident as described in the petition, that such accident was caused or was contributed by the negligence of the said Archie Lee Smith, in that the said Archie Lee Smith failed to exercise ordinary care for his own protection and safety under the surrounding circumstances and on ac-

count thereof, this defendant is not liable to the plaintiff herein.

Wherefore, having fully answered, this defendant prays that the said plaintiff take nothing against this defendant by reason of this action.

Atlantic Oil Producing Company, Defendant, by George F. Short, C. W. King, Its Attorneys.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

REPLY TO SEPARATE ANSWERS OF DEFENDANTS—Filed Oct. 15, 1929

Comes now the plaintiff, and files this as his reply to the separate answers of the defendants on file herein, and for cause thereof, avers:

That he denies, each, every, all and singular the allegations contained in said separate answers, and each and every paragraph thereof which are inconsistent with or contradictory to the allegations contained in his amended petition on file in this action.

Ford & Montgomery, Attorneys for Plaintiff.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT—Filed Dec. 18, 1929

Now on this 18th day of December, 1929, the same being a regular judicial day of the Special March 1929 Term of [fol. 41] this court, the above styled cause coming regularly on for trial, and the plaintiff appearing by his attorneys, Ford & Montgomery, and the defendant Fitzsimmons Drilling Company, appearing by its attorneys, H. C. Thurman, Ray S. Fellows and A. F. Moss, and Atlantic Oil Producing Company, appearing by its attorneys Short & King and

Hagen and Gavin, and all parties having announced ready for trial, and a jury having been empannelled [impaneled] and sworn, the plaintiff introduced in evidence a stipulation of the parties as to the residence of the plaintiff and the defendant, Fitzsimmons Drilling Company, Incorporated, and renewed his motion to remand to the State Court, whereupon, the presiding judge refused to renew the order overruling plaintiff's motion to remand, duly entered after a hearing before the resident judge of this district, denying plaintiff's renewed motion, to which the plaintiff excepted. Thereupon the plaintiff introduced evidence and rested, and the defendants separately demurred to the plaintiff's evidence, and the court having heard the arguments of counsel and being sufficiently advised,

It is Considered, Ordered and Adjudged that the separate demurrer of the defendants to the plaintiff's evidence, be and the same are hereby sustained, to which the plaintiff excepted and is allowed his exception.

It is further Considered, Ordered and Adjudged that this action be dismissed and the defendants have judgment against the plaintiff for costs.

T. Blake Kennedy, Judge.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING ADDITIONAL TIME TO FILE BILL OF EXCEPTIONS—Filed Feb. 12, 1930

Be It Remembered, That now on this 12 day of February, A. D. 1930, the above entitled action coming on to be heard upon plaintiff's application for additional time herein to make, serve and file a Bill of Exceptions in the above entitled cause, and the Court being fully advised in the premises finds that the 60-day time heretofore allowed plaintiff in said cause on December 18, 1929, by the Hon. T. Blake Kennedy, sitting as Trial Judge in said cause, is insufficient time in which to file said Bill of Exceptions, and [fol. 42] that said application should be and the same hereby is sustained.

It is, Therefore, by the Court Ordered, That the plaintiff be, and he hereby is granted and given up to and including

March 15th, A. D. 1930, to make, serve and file a Bill of Exceptions in the above entitled action.

Edgar S. Vaught, U. S. District Judge.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

**Bill of Exceptions**—Filed Feb. 18, 1930

Comes now the plaintiff, and presents the annexed statement, duly signed by the Trial Judge, Hon. T. Blake Kennedy, as his Bill of Exceptions in the above entitled cause.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff.

RECORD OF EVIDENCE AND PROCEEDINGS ON HEARING OF PLAINTIFF'S MOTION TO REMAND THE ABOVE-ENTITLED ACTION TO THE STATE COURT

The allegations of the defendants' petition for removal were all placed in issue by a verified motion to remand, which denied the allegations of the petition for removal, and the affirmative allegations of the motion to remand were placed in issue by verified response thereto, denying such allegations and attaching a transcript of the proceedings in the State Court at the time of the filing of plaintiff's amended petition in such court prior to the filing of the petition for removal.

However, on the hearing of the motion to remand, it was agreed that at the time of the filing of the amended petition in the above cause, which was in the State Court and which action was removed, Mrs. A. L. Smith and her two children, Dona G. Smith and Welford Lee Smith, who are referred to in said amended petition, were residents and citizens in the State of Oklahoma, and resided in the city of Cleveland, Pawnee County, in said State, and such citizenship re-
[fol. 43] mained unchanged, and that A. L. Smith, the deceased, for whose death damages are sought in said action, was a resident of said city, county, and state at the time of his death and left an estate in said county consisting of real estate, a homestead, and kitchen and household furniture, and the two causes of action set out in said amended petition arose wholly within the State of Oklahoma.

It was further agreed between the parties in open court on the hearing of said motion that the petition for removal correctly stated the filing of the four prior actions and correctly stated the proceedings in each, except, that in case #56098, filed in the District Court of Oklahoma County and removed to the United States Court for the Western District of Oklahoma, as case #3819—Law, and in case #43033, District Court of Tulsa County, Oklahoma, removed to the United States Court for the Northern District of Oklahoma, as #730—Law, L. H. Sharp was added to the defendants named in the prior suits as a party defendant; that all of said four suits involved one cause of action for $100,000.00 damages for the benefit of the widow and children for the death of A. L. Smith, but the petition in either of the cases did not contain a cause of action for damages for pain and suffering of the deceased, which were underwent from the time he was injured until he died. The present suit was originally filed in the District Court of Oklahoma County, State of Oklahoma, being case #57716, in said court, seeking to recover damages in the sum of $3,000.00 for the pain and suffering which the deceased, A. L. Smith, underwent from the time he was injured until he died, a period of some eight or ten hours. When the case was called for trial, the amended petition was filed in said cause, which contained two causes of action, the first cause of action being for the sum of $100,000.00 damages for the death of said deceased, A. L. Smith, and for the benefit of his next of kin, his widow and children, and the second cause of action being for $3,000.00 damages for the pain and suffering which the deceased underwent from the time he was injured until he died.

The defendants, on a motion to remand, introduced a copy of the probate proceedings of the County Court of Pawnee County, Oklahoma, in the matter of the estate of A. L. Smith, deceased, otherwise known as Archie Lee Smith, the [fol. 44] court having jurisdiction of the administration of said estate, which record showed in substance the following:

That the allegations with reference to the appointment of the widow, her resignation and the appointment of Wm. H. Mecom, as administrator of said estate, as charged in the petition for removal were true.

The record further showed that the estate had never been closed up but was still open and subject to administration.

The plaintiff, at the time this record was introduced, virtually admitted that one of the main purposes of having Wm. H. Mecom, a resident and citizen of the State of Louisiana, appointed as administrator of said estate, was to keep the defendants from removing the above entitled action from the State to the Federal Court, however, counsel for the plaintiff contended that the administrator had certain other duties to perform, which were the closing up of the estate of said deceased, A. L. Smith, and the bringing of this action, which included the cause of action for damages for pain and suffering, which under the Oklahoma law could only be prosecuted by the administrator. The defendants also took the deposition of the plaintiff, Wm. H. Mecom, and he was not cross examined by plaintiff's counsel. He testified, in substance, that he consented to act as administrator at the request of Roy F. Ford, of the law firm of Ford & Montgomery of Tulsa, Oklahoma, and that he received from them, in December, 1928, some papers to be signed by him consisting of an oath as administrator and a power of attorney naming, according to his judgment the widow of A. L. Smith, and the probate records introduced showed that on December 26, 1928, Wm. H. Mecom, signed the oath and signed an appointment of Mrs. A. L. Smith as resident agent for the foreign administrator, these two latter instruments being filed in the County Court of Pawnee County, Oklahoma on January 3, 1929. He further testified that he did not sign the petition for his appointment as administrator, and that according to his best judgment he did not sign the bond of administrator, and it is admitted that the name of Wm. H. Mecom was signed to the petition and bond by Roy F. Ford, as his attorney, and it is further agreed that said bond was filed and approved on December 12, 1928, before the letters of administration [fol. 45] were signed on December 26, 1928. He further testified that from the date of receiving the letters and papers to be signed from Roy F. Ford, attorney, to May 31, 1929, he had nothing further to do with the estate of A. L. Smith, deceased, and received absolutely no information about such estate, that he did not, at any time, enter into any agreement with Ford & Montgomery or A. H.

Meyer, either personally or as administrator, to either procure his appointment as administrator or file any action in his name, and that he, at no time, gave any direction with reference to the commencement of any action; and that he did not advance or provide any cost deposit for the filing of any suit, and that he never, at any time, had any knowledge or information of any assets or claim or litigation in which the estate of A. L. Smith was interested; that he was not related to or acquainted with either A. L. Smith, deceased, or any of his next of kin or heirs; so far as he could learn A. L. Smith left no estate in the State of Louisiana and that no property at any time came into the hands of the said Mecom, as administrator, and that Mrs. A. L. Smith, as administrator, never accounted to him for any assets of the estate of A. L. Smith; that he was a young attorney living at Columbia, Louisiana, and resided there for a number of years. He stated that he did not have any contract for any fees or accepted any fees and that his appointment was made as an accommodation to the firm of attorneys above referred to. It was agreed by the parties that both the plaintiff and the defendant, Fitzsimmons Drilling Company, Inc., a corporation, were residents and citizens of the State of Louisiana, at the time the amended petition was filed in the above entitled action in the State Court, and had both been residents and citizens for a long period of time prior thereto.

The plaintiff introduced no evidence in support of his motion to remand, but plaintiff contended that on account of what his [is] hereinabove set out that the court had no jurisdiction of the parties to the record. Honorable Edgar S. Vaught denied plaintiff's motion to remand to the State Court and expressed himself as being of the opinion that the plaintiff and his counsel were attempting to toy with the court and impose upon the court. To the court's order, in denying and overruling motion to remand, the plaintiff excepted and the exceptions were by the court allowed.

---

[fol. 46] RECORD OF EVIDENCE AND PROCEEDINGS ON THE TRIAL OF THE ABOVE-ENTITLED ACTION

After the jury had been empanelled in the above entitled action to try said case, and at the beginning of the introduction of testimony, it was agreed between the parties in open court, that the plaintiff Wm. H. Mecom, administrator of

the estate of A. L. Smith, and the defendant Fitzsimmons Drilling Company, Inc., a corporation, at the time of the filing of the amended petition in the above entitled action in the State Court, the said plaintiff and the last-mentioned defendant were both bona fide residents and citizens and inhabitants of the State of Louisiana. The plaintiff, thereupon, introduced a certified copy of the letters of administration, which showed that on the 10th day of December, 1928, William H. Mecom was appointed administrator of the estate of A. L. Smith, deceased, by the honorable County Court of Pawnee County, State of Oklahoma; that the said Wm. H. Mecom took his oath as administrator on the 26th day of December, 1928, before a Notary Public in the State of Louisiana, and that said letters of administration were duly filed in the County Court of Pawnee County, Oklahoma, on January 3, 1929, prior to the institution of the above entitled action in the State Court. The plaintiff also introduced in evidence a written appointment of agent which written appointment stated in substance that the said Wm. H. Mecom, as administrator of the estate of A. L. Smith, deceased, did thereby appoint Mrs. A. L. Smith, or Mrs. Archie Lee Smith, as his agent in the State of Oklahoma, for the purpose of accepting service of process as provided by the statutes of the State of Oklahoma. This instrument was dated December 26, 1928, signed by Wm. H. Mecom filed in the County Court of Pawnee County, Oklahoma, on the 3rd day of January, 1929. At this stage of the trial, the plaintiff orally requested the Honorable T. Blake Kennedy, the presiding judge at said trial, to remand said cause to the State Court from whence it was removed to the Federal Court on the ground and for the reason that the court had no jurisdiction of the parties of the record. Whereupon, after argument of counsel, the presiding judge overruled and denied said motion to remand to the State Court, and as his reason therefor, stated that the matter had already been passed on by the Honorable Edgar S. Vaught, who heard the proceedings in the original motion to remand filed in said case and overruled and denied the same, to which action of the court in denying said [fol. 47] motion to remand, the plaintiff excepted and exceptions were allowed.

At the conclusion of plaintiff's evidence, the plaintiff again renewed his oral motion to remand, which was again

denied by the trial judge, the Honorable T. Blake Kennedy. Thereupon, the defendants separately demurred to the plaintiff's evidence, which demurrers were by the court sustained, all of which is disclosed by the written Journal Entry of Judgment filed in the above entitled action dated December 18, 1929.

At the time of the rendition of the above and foregoing judgment, on December 18, 1929, the plaintiff asked and was granted sixty days in which to make, prepare and serve bill of exceptions in the above entitled action, and by a later order, dated February 12th, 1930, the plaintiff was granted and given an additional extension of time to make, prepare and serve bill of exceptions in the above entitled action and was granted up to and including March 15, 1930, to make, prepare and serve bill of exceptions in the above entitled action.

---

STIPULATION APPROVING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto that the above and foregoing statement of facts and narrative of testimony contains a full, true, correct and complete copy of all of the evidence and proceedings had in the above entitled action, in so far as the same affects the question of the removability of said cause from the State Court to the Federal Court and the jurisdiction of the Federal Court to hear and try said cause, and we hereby agree that the trial judge, Honorable T. Blake Kennedy, may sign the same as a bill of exceptions in the above entitled action, with the exception of the written Journal Entry of Judgment dated December 18, 1929, which is already a part of the record in the above entitled action.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff. Ray S. Fellows, H. C. Thurman, Attorneys for Defendant Fitzsimmons Drilling Com-
[fol. 48] pany. George F. Short, C. W. King, Attorneys for Defendant Atlantic Oil Producing Company.

CERTIFICATE AND ORDER APPROVING STATEMENT OF EVIDENCE AND PROCEEDINGS

Be It Remembered, That now on this 18 day of February, A. D. 1930, the foregoing narrative statement of facts, evidence and proceedings in the above entitled cause having been duly presented to me, and having examined the stipulation of counsel annexed thereto, and having examined such narrative statement of the evidence and proceedings,

It is Hereby Ordered and Adjudged by the Court, That the said narrative statement is a fair and true statement of the facts and evidence submitted on the trial of said cause, and is a fair statement of the proceedings had and taken therein insofar as the question of the jurisdiction to try and determine said cause is concerned, and also the removability of said cause from the state to the federal court, and;

It Is Hereby Ordered, That the same be and hereby is settled and signed as a Bill of Exceptions in the above entitled action, and that the same constitutes the full Bill of Exceptions in said cause, with the exception of the written Journal Entry of Judgment, dated December 18, 1929, which has already been filed and made a part of the record in the above entitled action.

Witness My Hand as the Trial Judge who presided in the trial of the above entitled action in the United States District Court for the Western District of Oklahoma, on February 18, A. D. 1930.

T. Blake Kennedy, United States District Judge.

[File endorsement omitted]

---

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Feb. 19, 1930

The above named plaintiff, feeling himself agreed [aggrived] by the decree made and entered in this cause on the 18th day of December, A. D. 1929, does hereby appeal from [fol. 49] the said judgment and decree to the U. S. Circuit Court of Appeals for the Tenth Circuit, for the reason

specified in the Assignment of Errors, which is filed herewith, and plaintiff prays that his said appeal be allowed.

That a citation issue, as provided by law. That a transcript of the record proceedings and papers upon which the said decree is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit, and that a Supersedeas be awarded, as provided by law.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff, William H. Mecom, Administrator of the Estate of Archie Lee Smith, Deceased.

[Filed endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 19, 1930

Comes now the plaintiff in the above entitled cause and shows to the Court that the judgment and decree entered therein on the 18th day of December, 1929, is erroneous and unjust to the plaintiff, and contains manifest error, which plaintiff assigns as follows:

(1) That the Court erred in overruling and denying, and in not granting and sustaining plaintiff's motion to remand, due to its lack of jurisdiction because both the plaintiff and the defendant were bona fide residents and citizens of the State of Louisiana at the time the above entitled action was instituted in the state court and removed to the U. S. District Court for the Western District of Oklahoma.

(2) That the Court erred in retaining jurisdiction, and in forcing plaintiff to try said cause in the above named court, because both the plaintiff and the defendant were bona fide residents and citizens of the state of Louisiana at the time said cause was originally filed, and at the time the same was removed, and at the time the same was tried.

(3) That the Court erred in rendering the judgment dated December 18, 1929, in the above entitled action in favor of the defendants and against the plaintiff, because the court had no jurisdiction to render the same on account

[fol. 50] of the plaintiff and the defendant both being residents and citizens of the state of Louisiana at the time the above entitled action was originally filed in the state court, and at the time the same was removed to the Federal Court, and at the time the said judgment was rendered in said cause.

Wherefore, plaintiff prays that said judgment be reversed and set aside, and that said cause be ordered remanded to the state court from whence it was removed.

Ford & Montgomery, A. H. Meyer, Attorneys for Plaintiff, William H. Mecom, Admr. of the Estate of Archie Lee Smith, Deceased.

[File endorsement omitted.]

---

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Feb. 25, 1930

Be It Remembered, That now on this 25 day of Feby. 1930, the above entitled action coming on to be heard upon the plaintiff's petition for appeal filed herein, and the Court being fully advised in the premises finds that said appeal should be and the same hereby is granted, upon the plaintiff giving a bond in the sum of five hundred dollars ($500.00) to cover the costs in said case, and conditioned further that the said plaintiff will exercise due diligence in the prosecution of his said appeal.

Edgar S. Vaught, Judge of the U. S. District Court.

[File endorsement omitted.]

---

NOTE REBOND ON APPEAL

(Bond on appeal in the sum of $500, with appellant as principal and The Century Indemnity Company as surety, approved by the District Judge, was filed in District Court Feb. 25, 1930.)

IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD.—Filed Feb. 25, 1930

To the clerk of the United States District Court for the Western District of Oklahoma:

You are hereby requested and directed to prepare a transcript for appeal in the above case, said transcript to include the following:

[fol. 51] 1. Plaintiff's Amended Petition.

2. Plaintiff's Petition for Removal, Notice of Removal, Bond on Removal, Order on Removal, Certificate of Clerk of State Court on Removal.

3. Plaintiff's Motion to Remand to the State Court.

4. Response of Defendants to Plaintiff's Motion to Remand.

5. Order Overruling and Denying Motion to Remand.

6. Separate Answer of Defendant, Fitzsimmons Drilling Company, Inc.

7. Separate Answer of Defendant, Atlantic Oil Producing Company.

8. Reply of Plaintiff to Separate Answers of Defendants.

9. Bill of Exceptions.

10. Journal Entry of Judgment, of December 18, 1929.

11. All Orders Extending Time to File Bill of Exceptions.

12. Notice of Appeal.

13. Petition for Appeal.

14. Assignment of Errors.

15. Order Allowing Appeal.

16. Citation and Service.

17. Appeal Bond.

18. Præcipe for Record, and Election as to Printing the Record.

19. Certificate of Clerk, to be attached to the record by yourself.

You will cause said transcript of the record to be duly certified and lodged with the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, at Denver, Colorado, for filing, as provided by law, and plaintiff hereby elects to have the said Record printed under the

direction, supervision and control of the Clerk of the United States Circuit Court of Appeals for the Tenth Circuit.

Dated this 25th day of February, 1930.

Ford & Montgomery, Attorneys for Plaintiff.

The undersigned, Attorneys of Record for the defendants in the above entitled action, hereby acknowledge service [fol. 52] of a copy of the foregoing Præcipe for Record, and agree and understand that the Clerk shall include the foregoing papers in the transcript making up the record in said cause.

Dated this 25th day of February, 1930.

H. C. Thurman, Attorneys for Defendant Fitzsimmons Drilling Company, Incorporated, a Corporation. George F. Short & C. W. King, Attorneys for Defendant Atlantic Oil Producing Company, a Corporation.

[File endorsement omitted.]

---

Clerk's certificate to foregoing transcript omitted in printing.

---

[fol. 53] Appearances of counsel omitted in printing.

---

[fol. 54] Minute entry of argument and submission October 16, 1930, omitted in printing.

---

In United States Circuit Court of Appeals, Tenth Circuit, January Term, 1931

No. 259

Messrs. Rey F. Ford, S. J. Montgomery, Theo. H. Haugh, and A. H. Meyer for Appellant.

Messrs. H. C. Thurman, Ray S. Fellows, for Appellee Fitzsimmons Drilling Company, Inc.; Messrs. George F.

Short, C. W. King, H. H. Hagen and T. A. Gavin for appellee Atlantic Oil Producing Company.

Before Lewis and Cotteral, Circuit Judges, and Pollock, District Judge

OPINION—Jan. 20, 1931

POLLOCK, District Judge, delivered the opinion of the court.

This action was instituted in a state court of Oklahoma to recover damages on account of the death of Archie Lee Smith, alleged to have been caused by the negligence and wrongful act of the defendants Fitzsimmons Drilling Company, a corporation of Louisiana, and The Atlantic Oil Producing Company, a corporation of Delaware. Smith was injured on May 24, 1927, and died on the following day. He left surviving him his widow, Lillian Smith and two small children. The statute of Oklahoma, sections 824 and 825, Compiled Laws of 1921, provide that damages in such case inure to the exclusive benefit of the widow and children, if any, to be distributed to them in the same manner as personal property of the deceased.

[fol. 55] The Supreme Court of that state, in St. Louis & S. F. R. Co. v. Goode, 42 Okl. 784, 142 Pac. 1185, held that the damages recovered in such a suit become assets of the decedent's estate but belong exclusively to the beneficiaries named therein. Shortly after the death of Smith his widow was appointed administratrix and she brought an action against the defendants in the state court alleging she and the two children as beneficiaries had been damaged in a very large amount. The defendants removed that case to the federal court and the plaintiff being unsuccessful on her motion to remand dismissed her action and shortly thereafter instituted another action like the first. This went through the same procedure as the first case. Thereafter, she resigned as administratrix and one William H. Mecom, a citizen and resident of the state of Louisiana was appointed administrator by a probate court of Oklahoma. He then brought a like action in the state court. It was removed to the federal court. That court refused to remand it. The plaintiff dismissed and then he brought this action

in the state court, in which, as in the prior cases, he embodied two counts. In the first count he alleged that he sues for the use and benefit of the widow and two minor children and asks damages in the sum of one hundred thousand dollars. In the second count he alleged deceased was conscious from the time he was injured until he died and on account of his injury suffered bodily pain and mental anguish from the time he was injured until he died, and prays damages in the sum of three thousand dollars therefor. The case was removed to the federal court and on the court's refusal to remand it went to trial and resulted in favor of defendants. Appellant comes here assigning error that the court overruled his motion to remand to the state court.

The grounds for the removal of the case from the state to the federal court were, first, diversity of citizenship, and second, a fraudulent intent and purpose on the part of Mrs. Smith and her attorney and the present plaintiff to defeat federal jurisdiction. Advertising to the last point, it appears that the resignation of Mrs. Smith and the appointment of Mecom in her stead was solely the act of her counsel who brought the prior suits and this one. He wrote to Mecom asking him if he would accept such an appointment. Mecom did not come to Oklahoma but signified his willingness to accept the appointment solely as an accommodation. [fol. 56] When he was appointed the attorney for plaintiffs signed the required oath and appointed Mrs. Smith as his resident agent. He did not sign the petition for his appointment as administrator nor the required bond. His name was signed to the petition and bond by counsel for the plaintiff in this case who had brought the prior suits for Mrs. Smith. He had nothing further to do with the estate of deceased and received no information about the estate. He gave no direction about the commencement of this or any other suit. He had no information about any litigation in which the estate might be interested and was in no way related to the deceased. So far as he could learn, the deceased left no estate in the state of Louisiana. He acted in the matter merely to accommodate Mrs. Smith's attorney. Counsel for appellant contends that under the laws of Oklahoma the appointment of Mecom as administrator was a legal act. That Mrs. Smith and her counsel acted lawfully in the procuring of Mecom's appointment and that their actions in that re-

spect cannot be held to have been fraudulent conduct, and that inasmuch as Mecom and one of the defendants were citizens and residents of the same state the case could not be removed on the ground of diversity of citizenship. I pass this point for the present.

There was diversity of citizenship between the beneficiaries, Mrs. Smith and her two children on the one side, and both defendants on the other; and it is contended by counsel for appellees that the citizenship of the beneficiaries and not of the nominal plaintiff controls. The whole recovery, should there be any, on the first count would go exclusively to the beneficiaries; no one else would have any interest therein. It would not belong to the estate of the deceased to be administered as other property of the estate, if any.

There can be no doubt but that if the recovery had on the first count was to go into the estate of deceased to be administered as part of that estate the administrator would be a proper and necessary party to the case for in such event he and his bond as administrator would be held liable for its proper application and distribution. But, in the instant case, while by force of the statute creating a cause of action for death by wrongful act when no such right of action existed at the common law, the action is purely statutory and an administrator may maintain the action for the sole use and benefit of the widow and children of the de- [fol. 57] ceased, and on no other grounds, and for no other purpose. It is the contention of defendants in such case the administrator is a purely nominal party and those for whose use and benefit the action is brought and prosecuted are the real parties in interest. That for the purpose of determining the jurisdiction of the federal courts of our country regard is had to the real parties in interest and not the merely nominal party. Thus, in Stewart v. Baltimore & Ohio Railroad Co., 168 U. S. 445, Mr. Justice Brewer, delivering the opinion for the court, said:

"For purposes of jurisdiction in the Federal Courts regard is had to the real rather than to the nominal party. Brown v. Strode, 5 Cranch, 303; McNutt v. Bland, 2 How. 9; State of Maryland, for the use of Markley v. Baldwin, 112 U. S. 490. See, also, Gaither v. Farmers' & Mechanics Bank of Georgetown, 1 Pet., 37, 42, in which the issue submitted

to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: 'This practice is familiar with the Maryland courts, and when the action originates in that form the cestui que use is regarded as the real party to the suit.' It is true those were actions on contract, and this is an action for a tort, but still in such an action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party."

In Maryland v. Baldwin, 112 U. S. 490, Mr. Justice Field, delivering the opinion for the court, said:

"So in the present case the State is a mere nominal party; she could not prevent the institution of the action, nor control the proceedings or the judgment therein. The case must be treated, so far as the jurisdiction of the Circuit Court of the United States is concerned, as though Markley was alone named as plaintiff; and the action was properly removed to that court."

See, also, Huff v. Hutchinson, 14 How. 586; Ferguson v. Ross, 38 Fed. 161, and cases cited therein; Browne v. Strode, supra; McNutt v. Bland, supra; State of Indiana v. Glover, 155 U. S. 513.

[fol. 58] It is further to be noted the petition for removal in this case pleads a separable controversy between the real parties in interest, Mrs. Smith, and her two children. Also a collusive attempt on the part of Mrs. Smith and the foreign plaintiff administrator by collusion and fraud to defeat the jurisdiction of the federal courts. In such case the case of Cerri v. Akron-People's Telephone Company and the village of Cuyahoga Falls, 219 Fed. 285, by a parity of reasoning would appear to be much in point. While that case is not like the present one in point of fact, by parity of reasoning it is alike in principle with the instant case. In that case, as here, the action was brought to recover damages for death by wrongful act of one William McCracken, a citizen of the state of Ohio, as were defendants the Telephone Company and the village of Cuyahoga Falls. In that case, as here, the widow of the deceased had the preferential

right of appointment as the administratrix of the estate of her husband, and there, as here, the widow renounced her right of appointment, and the plaintiff, a citizen of the Kingdom of Italy was appointed administrator and brought the action to recover for the wrongful death in the federal court. In that case, the object and purpose of the appointment was to so frame an action as to escape the jurisdiction of the state court and give the federal court jurisdiction. The object and purpose in *this* case of the appointment of a foreign administrator was to escape from the jurisdiction of the state court and give the federal court jurisdiction. The object and purpose in this case of the appointment of a foreign administrator was to escape the jurisdiction of the federal court and give the state court sole jurisdiction. In that case the beneficiaries who would take the entire recovery had were citizens of Ohio with defendants. In this case the beneficiaries who would take the entire recovery, if any be had, are citizens and residents of Oklahoma, a state foreign to that of Louisiana and Delaware. The court in that case first raised and determined the question of jurisdiction, whether there was collusion between the beneficiaries and others for the appointment of a citizen of a foreign country as administrator for the purpose of escaping the jurisdiction of the state and making a case cognizable in the federal court. In the course of an exhaustive and well reasoned opinion, citing a wealth of authorities, it was held the federal court had no jurisdiction and the case was [fol. 59] dismissed. The very object and purpose of the grant by Congress of jurisdiction to the federal courts of our country was to permit citizens of foreign states litigating with citizens of another state to escape the local influence of their adversaries by removal of such controversy into the federal court.

I am convinced on both grounds, under the peculiar facts of this case, the removal of the cause of action for death by wrongful act into the federal court was both consonant with justice and the true rule which should govern in such controversy.

Coming now to the second cause of action removed and pleaded in the petition, it may be said. That cause of action could neither have been brought in the federal court nor, standing alone, have been removed thereto for want of

jurisdiction over the subject-matter in a federal court for the jurisdictional amount in controversy was not claimed, and any recovery had would go into the estate for administration and distribution by the administratrix. However, I take it to be quite well settled when in a case like this a petition filed in a state court contains two counts of causes of action, one of which controversies is removable into a federal court, and the other not removable, a removal into a federal court of the cause of action which may be removed, brings the entire case into the federal court, as was done in this case. This proposition is so well and conclusively settled it needs but the citation of a few authorities in its behalf. Geer v. Mathieson Alkali Works, 190 U. S. 428; Barney v. Latham, 103 U. S. 205; Brooks v. Clark, 119 U. S. 502; Connell v. Smiley, 156 U. S. 335; Venner v. Southern Pac. Co., 279 Fed. 832; Rogers v. Penobscot Mining Co., 154 Fed. 606; Cella, Adler & Tilles v. Brown, 136 Fed. 439; Hamilton v. Empire Gas & Fuel Co., et al., and Schriver v. Same, 297 Fed. 422; Hoffman v. Lynch, 23 Fed. (2d) 518; Bedell v. Baltimore & O. R. Co., 245 Fed. 788; Strother v. Union Pac. R. Co., 229 Fed. 731; Flas v. Illinois Central R. Co., 229 Fed. 319, and many other cases.

It follows, on the entire record, we find no reversible error and the judgment is therefore affirmed.

It is so ordered.

---

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

COTTERAL, Circuit Judge, dissenting:

There was not diversity of citizenship in this case be-
[fol. 60] tween the plaintiff and the defendant, Fitzsimmons Drilling Company, both of them being citizens of Louisiana. To avoid the difficulty, it was claimed in the petition for removal that the plaintiff's selection and appointment as administrator was fraudulently obta-ned, in order to defeat the jurisdiction of the Federal Court. In the majority opinion, the pertinent facts are detailed which are held to justify denial of the motion to remand. I dissent because they are deemed to be wholly insufficient.

The suit was brought by the administrator of the estate of the deceased on two causes of action. The first was to recover damages for the loss by the next of kin of decedent's life, for their benefit, pursuant to sections 824 and 825, Comp. Okl. Stat. 1921, which require an administrator, if appointed, to prosecute the action. The second was brought, as required, by the administrator to recover damages which accrued to the decedent for pain and suffering endured by him, as an asset of the estate. St. L. & S. F. R. Co. v. Goode, 42 Okl. 784, 142 Pac. 1185; Smith v. C. R. I. & P. Co., 42 Okl. 577, 142 Pac. 398. The joinder of the causes of action was authorized in the name of the administrator. Sections 266 and 211 C. O. S. 1921.

It is settled law that the citizenship of a personal representative and not that of the beneficiaries controls for purposes of jurisdiction when the former may sue under state law. Rose, Fed. Juris. & Proc., sec. 262; Memphis St. Ry. Co. v. Bobo and Moore, 232 Fed. 708; City of Detroit v. Blanchfield, 13 Fed. (2) 13; Mexican Cent. R. Co. v. Eckman, 187 U. S. 429; Memphis St. Ry. Co. v. Moore, 243 U. S. 299; Black v. Brown, 276 U. S. 518: In Oklahoma, an administrator is not a merely nominal party. By Section 1197, Ch. 5, Art. IV, C. O. S. 1921, the possession of the estate is vested in him, and it is his duty to collect the debts due the decedent or the estate.

Without reviewing the facts in opposition to the motion to remand, it is a sufficient answer, that the widow of the deceased was a party to plaintiff's appointment by her resignation and designation of him as her agent, counsel in soliciting his appointment is presumed to represent her in selecting him in her stead, his signature on the petition and bond for his appointment was not required by the laws of Oklahoma, he was qualified as a non resident (Secs. 1153 and 1141, Art. III, Ch. 5, C. O. S. 1921), the estate in Okla- [fol. 61] homa conferred jurisdiction to appoint him (Sec. 1088, Art. I, Ch. 5, C. O. S. 1921); the official oath taken by him obligated him to perform the duties of his trust, and there is no showing that the County Court did not direct this suit in his name.

The plaintiff's selection and appointment was not fraudulent, because a lawful act cannot be so regarded. The County Court alone had jurisdiction to make the ap-

pointment, it imported a finding of every essential jurisdictional fact, and it is not subject to collateral attack. Wolfe v. Gills, 96 Okl. 6, 219 Pac. 350. Until vacated by the County Court, the appointment stands as authoritative and binding in every other forum. It is immaterial that the object of the plaintiff's appointment was to defeat removal to the Federal Court, within the same principle that joining a defendant in a suit is not fraudulent, whatever the motive may be, if by the state law he has a joint liability. Illinois Central R. Co. v. Sheegog, 215 U. S. 308; Chic. B. & Q. R. Co. v. Willard, 220 U. S. 413. In my opinion, the judgment should be reversed, with direction to remand this case to the state court.

But if this be a mistaken view, and the case was removable, then the action itself should have been dismissed by the District Court, and we should reverse the judgment, with direction to dismiss it, because the defendant's position is necessarily that there is no competent party plaintiff. A Federal Court is bound of its own motion to dismiss a suit where jurisdiction is wanting. Sec. 80, U. S. Code. The defendant takes the inconsistent position that for the purpose of removal the plaintiff is not a competent party and yet for the purpose of a trial he is competent, and it is here insisting on an affirmance of the adjudication on the merits of the demands in suit. Either the action must be remanded or dismissed. The case of Cerro v. Akron People's Telephone Co., cited in the majority opinion, is authority for the dismissal of this case.

There were four prior suits. They were brought upon but one cause of action, the first in this suit, to which the second was added for the first time in this case. The defendant may have had ground to enjoin those suits as vexatious, but the remedy was waived. The right to dismiss a case without prejudice before submission is expressly authorized by the state law. Sec. 614, Ch. 3, Art. XXII, [fol. 62] C. O. S. 1921. There was no adjudication in those suits. They have no bearing in this controversy, are mere matters of aggravation and are of no consequence.

I am unable to find any claim to a separable controversy in the removal petition. However, if asserted there, it would be immaterial. Both causes of action, the second adopting the first, charged a joint liability against the de-

fendants. A defendant cannot make an action several which a plaintiff has elected to make joint. Rose, Fed. Juris. & Proc., Sec. 362; Terrence v. Shedd, 144 U. S. 527; Ches. & O. R. Co. v. Dixon, 179 U. S. 131; Illinois Central R. Co. v. Sheegog, supra; McAllister v. Ches. & O. R. Co., 243 U. S. 302.

---

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Jan. 23, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, and that Fitzsimmons Drilling Company, Incorporated, a corporation, and Atlantic Oil Producing Company, a Corporation, appellees, have and recover of and from William H. Mecom, Administrator of the Estate of Archie Lee Smith, appellant, their costs herein.

---

[fols. 63-98] Petition for Rehearing, covering 31 pages, filed February 9, 1931, omitted from this print. It was denied and nothing more by order; February 12, 1931.

---

[fol. 99] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—Feb. 12, 1931

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

MOTION TO STAY MANDATE—Filed Feb. 16, 1931

Comes now the Appellant above named, and respectfully moves this Honorable Court to stay the mandate in the above entitled action and not permit the same to be issued out of said cause until the further order of the court, on [fol. 100] the ground and for the reason that Appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on writ of certiorari the decision and judgment rendered in favor of Appellees and against Appellant in the above entitled action, and:

Appellant further shows to the court that he is ready, able and willing to make a good and sufficient bond, conditioned as provided by law, in said cause.

Wherefore, Appellant prays that the court make and enter an appropriate order herein staying the issuance of the mandate in the above entitled action until the further order of the court, and that the court fix the amount of the bond required of Appellant, and that he be given a reasonable time in which to make, execute and file said bond.

Roy F. Ford, S. J. Montgomery, Ted Haugh, A. H. Meyer, Attorneys for Appellant.

STATE OF OKLAHOMA,
County of Tulsa, ss:

Roy F. Ford, upon oath says:

That he is one of the attorneys of record for the appellant in the above entitled action; that he served a copy of the above and foregoing motion upon appellees by mailing to H. C. Thurman, Oklahoma City, Oklahoma, and Ray S. Fellows, Tulsa, Oklahoma, counsel for Appellee, Fitzsimmons Drilling Company, Inc., and also served it on the Appellee, Atlantic Oil Producing Company, by mailing to its counsel, George F. Short and C. W. King, Oklahoma City, Oklahoma, and to H. H. Hagen and T. A. Gavin, Tulsa, Oklahoma, counsel for Appellees; said copies being mailed by regular United States mail with the postage duly paid

thereon, and the same having been deposited in the Post Office of Tulsa, Oklahoma, on February 13, 1931.

Roy F. Ford.

[fol. 101] Subscribed and sworn to before me this 13th day of February, A. D. 1931. Charlotte F. Basse, Notary Public. My commission expires Nov. 29, 1931. (Seal.)

---

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER GRANTING STAY OF MANDATE—February 16, 1931

This cause came on to be heard on the motion of appellant for a stay of the mandate herein.

On consideration whereof, it is now here ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

---

Clerk's certificate to foregoing transcript omitted in printing.

---

[fol. 102] (Seal of the United States Circuit Court of Appeals, Tenth Circuit.)

---

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 20, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified

copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

Endorsed on cover: File No. 35,712. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 32. William H. Mecom, administrator of the estate of Archie Lee Smith, deceased, petitioner, vs. Fitzsimmons Drilling Company, Inc., and Atlantic Oil Producing Company. Petition for a writ of certiorari and exhibit thereto. Filed March 12, 1931. File No. 35,712.

---